U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 30 November 2005

Case No.: 2004-BLA-06203

In the Matter of

JAMES S. SHEPHERD
Claimant

v.

DRUMMOND COMPANY, INC.
Employer

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

James S. Shepherd
Pro se

C. Andrew Kitchen, Esquire
For Employer

Before: ROBERT D. KAPLAN
Administrative Law Judge

DECISION AND ORDER
AWARDING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a disease of the lungs resulting from coal dust inhalation.

[1] The regulations cited are the amended regulations that became effective on January 19, 2001. 20 C.F.R. Parts 718 and 725. (2001)

On April 30, 2004 this case was referred to the Office of Administrative Law Judges for a formal hearing. Subsequently, the case was assigned to me. The hearing before me was scheduled for October 19, 2005. However, on September 26, 2005 the hearing was canceled because both Claimant and Employer waived the oral hearing and agreed that the case would be decided based on the documentary evidence of record. In my Order of September 26, 2005 I allowed the parties to file additional evidence and briefs. Employer submitted the April 5, 2005 narrative report of Dr. Allan Goldstein and the physician's reports of his pulmonary function testing ("PFT") and arterial blood gas testing ("ABG"). This proffer is herewith admitted in evidence as Employer's Exhibit 1 ("EX 1").[2] Employer submitted a brief on October 17, 2005. Claimant did not submit a brief. The decision that follows is based upon an analysis of the record, the arguments of the parties and the applicable law.

I. ISSUES

Claimant alleges that he had a coal mine employment history totaling 39 years. Director found that Claimant had established 26 years 10 months of coal mine employment. Employer has not controverted the latter finding, and I find that the record supports this determination. (DX 23)

The following issues are presented for adjudication:

1. Whether the presence of pneumoconiosis has been established.
2. Whether Claimant's pneumoconiosis arose out of his coal mine employment.
3. Whether Claimant is totally disabled.
4. Whether Claimant's total disability is due to pneumoconiosis.
5. Whether Claimant has established a change in a condition of entitlement pursuant to § 725.309(d).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Claimant filed his initial claim for black lung benefits on September 18, 1984. The claim was denied by the District Director on December 21, 1984. (DX 1) Claimant filed a second claim on March 2, 1987. The District Director denied this claim on June 17, 1987. (DX 2) Claimant filed the current claim on February 10, 2003. The District Director denied the instant claim on January 13, 2004. (DX 4, 20) Claimant requested a formal hearing on February 10, 2004. (DX 21)

B. Factual Background

[2] The record also contains Director's Exhibits ("DX") 1 through 23, which are herewith received in evidence.

Claimant was born on July 15, 1922. He divorced his first wife in 1955 and married his second wife in 1956. His second wife is deceased, and Claimant has no dependents for the purposes of augmentation of benefits. (DX 1, 4)

As Claimant did not testify at a hearing, I refer to his statements to the Department of Labor and to physicians regarding his medical history and complaints. Claimant stated that his coal mine employment was in underground mining that required him to perform lifting of a heavy exertional nature. (DX 5, 6) Claimant reported to Dr. Hawkins that he has orthopnea, occasional production of sputum dyspnea, and can walk up to two miles if he slows down when he experiences shortness of breath. The physician noted that Claimant had dyspnea at times when walking on the treadmill. The physician also noted that Claimant had a history of arthritis, heart disease and hypertension, and had smoked one pack of cigarettes daily from age 21 until 1961. (DX 12) Claimant reported to Dr. Goldstein that he had been hospitalized for gastrointestinal bleed and, in 1998, for myocardial infarction. Claimant noted that he had intermittent shortness of breath, a minimal dry cough, and episodes of wheezing. (EX 1)

C. Entitlement

Because this claim was filed after the effective date of the Part 718 regulations, Claimant's entitlement to benefits will be evaluated under Part 718 standards. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) he suffers from pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) he is totally disabled, and (4) the total disability is caused by pneumoconiosis. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994).

The prior claim was denied by the District Director on June 17, 1987 based on the finding that Claimant had failed to establish the presence of pneumoconiosis. (DX 2) Therefore, the current or "subsequent claim" must be denied unless the new evidence demonstrates that one of the applicable conditions of entitlement has changed since the denial of the prior claim. § 725.309(d). Section 725.309(d) also provides that the following rules shall apply in adjudicating subsequent claims:

> (1) Any evidence submitted in connection with any prior claim shall be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim.
>
> (2) For purposes of this section, the applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based. For example, . . . if the claim was denied because the miner did not meet one or more of the eligibility criteria contained in part 718 of this subchapter, the subsequent claim must be denied unless the miner meets at least one of the criteria that he or she did not meet previously.

(3) If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence submitted in connection with the subsequent claim establishes at least one applicable condition of entitlement.

(4) If claimant demonstrates a change in one of the applicable conditions of entitlement, no findings made in connection with the prior claim, except those based on a party's failure to contest an issue (see § 725.463), shall be binding on any party in the adjudication of the subsequent claim.

§ 725.309(d).

D. Elements of Entitlement—Change in Applicable Conditions of Entitlement

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at § 718.202(a)(1) through (a)(4):

(1) X-ray evidence. § 718.202(a)(1).

(2) Biopsy or autopsy evidence. § 718.202(a)(2).

(3) Regulatory presumptions. § 718.202(a)(3).

a) § 718.304 - Irrebutable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

b) § 718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

c) § 718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one of more coal mines prior to June 30, 1971.

(4) Physician's opinions based upon objective medical evidence § 718.202(a)(4).

X-ray evidence, § 718.202(a)(1)

Under § 718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with § 718.102. The current record contains the following chest X-ray evidence.[3]

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASS
4/8/03	4/13/03	DX 12	Ballard	BCR, B	1/0
4/8/03	8/23/03	DX 19	Wheeler	BCR, B	Negative
4/5/05	4/5/05	EX 1	Goldstein	---	Negative

It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 664, 666-7 (4th Cir. 1978). The Benefits Review Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, a judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The film taken on April 8, 2003 was interpreted as positive for pneumoconiosis by Dr. Ballard and as negative for pneumoconiosis by Dr. Wheeler. As the qualifications of the two physicians are similar, the contrary interpretations in essence cancel out each other. The April 5, 2005 film was interpreted as negative by Dr Goldstein. The record does not contain the qualifications of Dr. Goldstein. Consequently, I give little if any weight to the physician's negative interpretation of the April 2005 film. However, as this negative interpretation is the only uncontradicted current X-ray interpretation of record, I find that the current X-ray evidence fails to support a finding of the presence of pneumoconiosis.

[3] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. § 37.51. A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. § 727.206(b)(2)(iii) (2001).

Biopsy or autopsy evidence, § 718.202(a)(2)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

Regulatory presumptions, § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§ 718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. § 718.305(e) Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions is applicable, the existence of pneumoconiosis has not been established under § 718.202(a)(3).

Physicians' opinions, § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under § 718.202 is set forth as follows in subparagraph (a)(4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in § 718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis." Section 718.201 (a)(1) and (2) defines clinical pneumoconiosis and legal pneumoconiosis. Section 718.201(b) states:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

A physician's opinion is well-documented and reasoned when it is based on evidence such as physical examinations, symptoms, and other adequate data that support the physician's conclusions. See Fields v. Island Creek Coal Co., 10 B.L.R. 1-19 (1987); Hess v. Clinchfield Coal Co., 7 B.L.R. 1-295 (1984). A medical opinion that is undocumented or unreasoned may

be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 B.L.R. 1-149 (1989); see also Duke v. Director, OWCP, 6 B.L.R. 1-673 (1983) (a report is properly discredited where the physician does not explain how the underlying documentation supports his or her diagnosis). A medical opinion is adequately documented if it is based on items such as a physical examination and an accurate smoking history and report of coal mine employment. See Perry v. Director, OWCP, 9 B.L.R.1-1 (1986).

The current record contains the opinions of Drs. Jeffrey Hawkins and Allan Goldstein regarding the presence of pneumoconiosis. As the physicians relied in part on their laboratory studies, these will be described at this time.

The current record contains the pulmonary function studies summarized below.

DATE	EX. NO.	PHYSICIAN	AGE	FEV_1	FVC	MVV	FEV_1/FVC	EFFORT	QUALIFIES
4/8/03	DX 12	Hawkins	80	1.88	2.46	88	76%	Good	No[4]
4/5/05	EX 1	Goldstein	82	1.88	2.29	86	82%	Good	No

The current record contains the arterial blood gas studies summarized below.

DATE	EX. NO.	PHYSICIAN	PCO2	PO2	QUALIFIES
4/8/03	DX 12	Hawkins	41 42*	86 93*	No No*
4/5/05	EX 1	Goldstein	40 39*	82 88*	No No*

*post-exercise

Dr. Hawkins examined Claimant on April 8, 2003 at the behest of the Department of Labor and issued a report dated May 12, 2003. (DX 12) Dr. Hawkins opined that Claimant has pneumoconiosis. The physician stated that his opinion was based on Dr. Ballard's interpretation of the 2003 "abnormal" chest X-ray, a finding of a restrictive lung defect, and Claimant's dyspnea. The physician also took note of Claimant's extensive coal mine employment history.

Dr. Goldstein examined Claimant on April 5, 2005 at the behest of Employer and issued a report bearing that date. (EX 1) Dr. Goldstein opined that Claimant did not have pneumoconiosis. Rather, the physician stated diagnoses of cardiac disease with atrial fibrillation, and an oat cell carcinoma. He attributed Claimant's pulmonary symptoms to cardiac disease and deconditioning. In the latter regard, Dr. Goldstein noted that Claimant was "overweight."

[4] Although the report of the 2003 PFT listed Claimant as 70 inches tall, Drs. Hawkins and Goldstein both measured him at 69 inches in height. (DX 12, p. 3; EX 1, p. 2) I have used the latter height in evaluating the PFTs.

The opinions of Drs. Hawkins and Goldstein with regard to the presence of pneumoconiosis are both reasoned and documented. The laboratory studies considered by Drs. Hawkins and Goldstein are very similar, as are their clinical findings. The major difference in the data on which they relied is that Dr. Hawkins relied on the positive chest X-ray interpretation by Dr. Ballard, while Dr. Goldstein relied on his own negative X-ray interpretation. On the other hand, Dr. Wheeler concluded that the 2003 chest X-ray was negative for pneumoconiosis, while Dr. Goldstein's qualifications for interpreting X-rays are not of record.

Considering the foregoing, I conclude that the opinions of Drs. Hawkins and Goldstein are essentially in equipoise. Consequently, I turn to the physicians' qualifications to break the stalemate. The District Director reported that Dr. Hawkins is Board certified in internal medicine and pulmonary disease (DX 20: Proposed Decision and Order at 6), while Dr. Goldstein's qualifications are not of record. I therefore find that the opinion of Dr. Hawkins that Claimant has pneumoconiosis is entitled to greater weight than the contrary opinion of Dr. Goldstein.

Therefore, the new physicians' opinion evidence under § 718.202(a)(4) supports a finding of the presence of pneumoconiosis.

Weighing all the evidence, I find that the opinion of Dr. Hawkins that Claimant has pneumoconiosis outweighs the current contrary X-ray evidence, which I previously found did not support a finding of pneumoconiosis. In this regard I note that the negative interpretation of the April 2003 film was given little if any weight.

Based on the foregoing, I find that the current medical evidence establishes the presence of pneumoconiosis. Consequently, Claimant has established a change in this applicable condition of entitlement subsequent to the denial of his prior claim on January 13, 2004. § 725.309(d).

E. Entitlement—The Entire Record

Once a claimant has demonstrated a change in an applicable condition of entitlement by the new evidence, as Claimant has done here, the entire record must be considered.

1. The Presence of Pneumoconiosis

I have considered the prior evidence of record with regard to whether Claimant has established the presence of pneumoconiosis. The prior evidence antedates the new evidence by at least 16 years. Consequently, and as pneumoconiosis is a progressive and irreversible disease, the new evidence – which I have found establishes the presence of pneumoconiosis – is entitled to substantially more weight than the old evidence. Therefore, based on the entire record, I find that Claimant has established the presence of pneumoconiosis. § 718.202(a)(1)-(4).

2. Pneumoconiosis Arising Out of Coal Mine Employment

The regulations provide that a miner who was employed for at least ten years in coal mine employment is entitled to a rebuttable presumption that pneumoconiosis arose out of coal mine employment. § 718.203(b). However, where a miner has established less than ten years of coal mine employment history, "it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship." § 718.203(c).

As Claimant has established a coal mine employment exceeding 26 years, he is entitled to the presumption in § 718.203(b). In addition, in his report dated May 12, 2003 Dr. Hawkins opined that the etiology of Claimant's pneumoconiosis was the "coal mine environment" in which he had been employed. (DX 12, ¶7) No physician has expressed the opinion that Claimant has pneumoconiosis with an etiology other than his coal mine employment. Consequently, I find that the record as a whole establishes that Claimant's pneumoconiosis arose, at least in part, out of his coal mine employment. § 718.203(a).

3. Total Disability

Claimant must establish that he is totally disabled due to a respiratory or pulmonary condition. Section 718.204(b)(1) provides as follows:

> [A] miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner
>
> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment . . . in a mine or mines . . .

§ 718.204(b)(1).

Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also, Beatty v. Danri Corp., 16 B.L.R. 1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993 (3d Cir. 1995).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i-iv). Producing evidence under one of these four ways will create a presumption of total disability only in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

There is no evidence that Claimant has cor pulmonale with right-sided congestive heart failure. None of the new PFTs and ABGs qualifies to establish total disability. However, I note that the FEV-1 value of 1.88 liters obtained in the PFTs performed in both 2003 and 2005 is only six-hundredths (.o6) of a liter above the qualifying value of 1.82 liters. These laboratory studies outweigh the earlier studies because the earlier studies were performed at least 16 years prior to the new ones.

The new physicians' opinion evidence regarding total disability is contained in the reports of Drs. Hawkins and Goldstein. Dr. Hawkins stated that Claimant has a restrictive lung defect with a minimal to mild respiratory or pulmonary impairment. In addition, Dr. Hawkins stated that Claimant "can't perform heavy manual labor." (DX 12, ¶8) As Claimant's last coal mine employment included work of a heavy exertional nature, I find that Dr. Hawkin's opinion constitutes the finding that Claimant is totally disabled under the Act. Dr. Hawkins also stated a diagnosis of coronary artery disease due to atherosclerotic vascular disease and opined that Claimant's pneumoconiosis and coronary artery disease each contributed 50 percent to Claimant's impairment due to "chronic respiratory or pulmonary disease." (DX 12, ¶8) This is consistent with a finding that Claimant's pulmonary or respiratory impairment standing alone caused his total disability. As Dr. Hawkins relied on Claimant's report of his symptoms, his positive clinical finding of dyspnea, and the 2003 PFT which the physician stated revealed a mild reduction in the FVC value, I find that Dr. Hawkin's opinion is reasoned and documented.

Dr. Goldstein did not state a clear opinion with regard to whether Claimant had a totally disabling respiratory or pulmonary condition. (EX 1) Dr. Goldstein stated that the 2005 ABG was "normal" and that the 2005 PFT "suggests a restrictive defect with the diffusion being normalized by alveolar volume." In the "Summary, Conclusions and Discussion" portion of his report Dr. Goldstein stated that Claimant had intermittent shortness of breath and "his restriction is related to his body stature, which is due to a 50-pound weight gain since his retirement." The physician also stated that Claimant's "symptoms . . . are all related to cardiac disease and deconditioning." Dr. Goldstein did not directly address the question of total disability and I am unable to infer from the statements in his report whether or not he was of the opinion that Claimant was totally disabled under the Act.

The physicians' opinions in the record that antedate the opinion of Dr. Hawkins are at least 16 years older than Dr. Hawkin's 2003 opinion.[5] Consequently, I find that the opinion of Dr. Hawkins that Claimant is totally disabled outweighs the earlier opinions. Furthermore, I find that the opinion of Dr. Hawkins is uncontradicted by the 2005 opinion of Dr. Goldstein which does not address the question of total disability and is ambiguous in that regard. In addition, even if it could be found that Dr. Goldstein expressed the opinion that Claimant was not totally disabled, such an opinion is outweighed by the contrary opinion of Dr. Hawkins based on his superior qualifications that are of record.

[5] The report generated by the 1987 claim is by Dr. Goldstein and is dated April 9, 1987. (DX 2) The record also contains reports generated by the 1984 claim by Dr. George Risman dated November 1 and November 8, 1984. (DX 1)

Weighing the entire record, I find that Claimant has established that he is totally disabled due to a respiratory or pulmonary condition based on the reasoned and documented opinion of Dr. Hawkins. § 718.204(b)(1)(2).

4. Total Disability Due to Pneumoconiosis

Claimant must establish that he is totally disabled due to pneumoconiosis. This element of entitlement is established if pneumoconiosis, as defined in § 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. § 718.204(c)(1). The regulations provide that

> Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

§ 718.204(c)(1). Finally, the regulations provide that Claimant can establish this element of entitlement by a physician's documented and reasoned medical report. § 718.204(c)(2).

Dr. Hawkins stated the opinion that Claimant's pneumoconiosis and his coronary artery disease each contributed 50 percent to his total respiratory or pulmonary disability. (DX 12, ¶8) This constitutes the opinion that pneumoconiosis was a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. I find that this opinion of Dr. Hawkins is reasoned and documented. Dr. Goldstein stated that Claimant's symptoms were due to his weight gain, cardiac disease and deconditioning. (EX 1) However, as Dr. Goldstein stated the opinion that Claimant does not have pneumoconiosis, while I have found to the contrary, the opinion of the physician regarding the cause of Claimant's impairment is entitled to no weight. Once again, the earlier evidence is too outdated to be entitled to any weight.

Based on the opinion of Dr. Hawkins, I find that Claimant has established by the evidence as a whole that pneumoconiosis was a substantial contributor to his total respiratory or pulmonary disability. § 718.204)(a)-(c).

F. Conclusion

As Claimant has established that he is totally disabled due to pneumoconiosis arising out of his coal mine employment, he is entitled to benefits under the Act.

G. Commencement of Benefits

Section 725.503(b) provides:

> Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.

Section 725.309(d)(5) provides that

> In any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final

In the instant case I am unable to determine from the record when Claimant's total disability commenced. Thus, benefits shall commence on the later of the month in which the claim was filed – February 2003 – or the District Director denied the prior claim – June 1987. Thus, benefits shall commence as of February 2003.

ATTORNEY FEE

As Claimant was not represented by an attorney or other representative, no award of a fee shall be made.

ORDER

The claim of James S. Shepherd for benefits under the Act is AWARDED. Benefits shall commence as of February 2003.

A

Robert D. Kaplan
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and

the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).